

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 26, 2013

Diane M. Fremgen
Clerk of Court of Appeals

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Appeal No. 2010AP1622-CR

Cir. Ct. No. 2007CF17

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAVIER REYES OTERO,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Waukesha County: LEE S. DREYFUS, JR., Judge. *Affirmed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Javier Reyes Otero appeals from judgments convicting him after a jury trial of three counts of first-degree sexual assault of a child and an order denying his postconviction motion for a new trial. We

conclude that trial counsel was not ineffective and Otero did not establish that new evidence required a new trial. We affirm.

¶2 The amended criminal complaint alleged that between December 29, 2006, and January 5, 2007, Otero had sexual contact and intercourse with a child under the age of thirteen. The jury convicted him. Postconviction, Otero alleged that his trial counsel was ineffective and that he had newly discovered evidence requiring a new trial. After an evidentiary hearing, the circuit court denied the postconviction motion.

¶3 We recite only the trial evidence relevant to the issues on appeal. The eleven-year-old child testified at trial regarding the assaults that occurred when she was ten years old. Among other incidents, she testified that Otero placed his penis in her anus.

¶4 Nurse Linda Wentworth attended the child in the emergency department on January 7, 2007, and she was present for the physician's examination. She testified that the attending physician showed her an area near the child's anus that appeared to be a bruise with scattered petechiae. In Wentworth's experience, that type of injury results from the application of force to the area and does not result from poor hygiene, bowel habits or any other non-traumatic factors. The nurse testified without equivocation that she observed redness and petechiae associated with bruising, not a rash.

¶5 Dr. Angela Carron, a pediatrician at the Child Protection Center, testified that she evaluated the child two days later on January 9, 2007. Dr. Carron reviewed the emergency department's treatment notes. The treatment notes indicated that there was no sign of trauma to the child's genitals, but the emergency department physician observed redness or petechiae around the anal

area.¹ Dr. Carron testified that a normal physical exam would neither confirm nor deny that a child had been sexually abused because the mucosal tissues in the genital and anal area are resistant to trauma. As a result, few children who report sexual abuse have physical findings of tissue injury. On cross-examination, Dr. Carron denied that petechiae can result from poor hygiene or a rash. On redirect, Dr. Carron testified that petechiae would be consistent with blunt force trauma to the area from a penis.

¶6 Detective Grall testified that he performs forensic examinations of computers. He found adult pornography on a compact disc seized from Otero. On a computer seized from Otero, the detective found records of internet searches that, in his experience, would likely yield pornographic pictures of children. The detective also found four thumbnails labeled “Child Porn Company” containing digital images of very young children. On cross-examination, the detective conceded that anyone, not just Otero, could have used the computer for these purposes.

¶7 Dr. James Harasymiw, a clinical psychologist, testified for the defense. After conducting a clinical interview, administering the Psychopathy Checklist-Revised and Static-99 instruments, and reviewing Otero’s history, Dr. Harasymiw opined that Otero did not have a diagnosable sexual disorder, and he was not a child molester.

¶8 Dr. Edward Friedlander, a pathologist, testified for the defense that based on his review of the child’s medical records, the redness in the child’s anal

¹ Dr. Carron defined petechiae as tiny, pinpoint hemorrhages into the tissues surrounding a small blood vessel or capillary. The area may appear bruised.

area could have been a rash or the result of poor hygiene, but the redness was not evidence of sexual assault. Dr. Friedlander testified that the emergency department attending physician was not confident that petechiae were present in the anal area, Dr. Carron did not see petechiae two days later when she examined the child. The medical records did not contain any photographs of the child's anal area as it appeared during the emergency department visit. Dr. Friedlander opined that the medical records he reviewed did not substantiate a sexual assault. However, Dr. Friedlander conceded that even if the child had been penetrated anally, a physical examination would not necessarily confirm penetration because the tissues in that area are elastic.

¶9 Hollida Wakefield, a forensic psychologist, criticized the manner and techniques used in the multiple informal and formal interactions with the child about her sexual assault allegations. Wakefield also raised questions about the child's reliability in light of the child's autism. The State vigorously cross-examined Wakefield regarding her professional activities, potential biases, her specific knowledge of the child's cognitive level and abilities, and the basis for her criticism of the multiple interactions with the child.

¶10 The jury convicted Otero. Postconviction, Otero argued that his trial counsel was ineffective and that he had newly discovered evidence. The circuit court denied Otero's postconviction motion after an evidentiary hearing.

¶11 We first address Otero's claims of ineffective assistance of trial counsel. "There are two components to a claim of ineffective counsel: a demonstration that counsel's performance was deficient, and a demonstration that such deficient performance prejudiced the defendant. The defendant has the burden of proof on both components." *State v. Smith*, 207 Wis. 2d 258, 273, 558

N.W.2d 379 (1997) (citation omitted). Whether counsel’s actions constitute ineffective assistance presents a mixed question of law and fact. *State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). The circuit court’s findings about counsel’s conduct will be upheld unless clearly erroneous. *Id.* However, whether counsel performed deficiently and prejudiced the defendant are questions of law which we review de novo. *Id.* We need not consider whether trial counsel’s performance was deficient if we can resolve the ineffectiveness issue on the ground of lack of prejudice. *State v. Moats*, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

¶12 To establish prejudice, “the defendant must affirmatively prove that the alleged defect in counsel’s performance actually had an adverse effect on the defense.” *State v. Reed*, 2002 WI App 209, ¶17, 256 Wis. 2d 1019, 650 N.W.2d 885. The defendant “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* (citation omitted).

¶13 Otero argues on appeal that his trial counsel was ineffective because he did not file a formal, written demand for discovery under WIS. STAT. § 971.23 (2007-08).² In lieu of a written discovery demand, counsel relied upon the district attorney’s open file policy and information he acquired when he represented Otero in the CHIPS proceeding involving Otero’s family. After the postconviction motion hearing, the circuit court found that trial counsel had access to all discovery items and received all discovery-type information from the State. Trial counsel

² All subsequent references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

participated in the CHIPS proceeding and had access to the evidence adduced during that proceeding. Many of the same witnesses testified at the CHIPS proceeding and the sexual assault jury trial. The circuit court's findings are not clearly erroneous. *Sanchez*, 201 Wis. 2d at 236. These findings inform our analysis of Otero's two other discovery-related ineffective assistance claims.

¶14 First, Otero argues that the absence of a written discovery demand hindered counsel's effective cross-examination of Detective Grall. The detective testified about digital images of child pornography found on one of Otero's computers. The supplemental police report containing this information was sent to counsel approximately one month before trial. The record confirms that defense counsel cross-examined the detective about this evidence and information regarding computer data storage, the ability to delete data, and Otero's history of use of the computers on which pornography was found.

¶15 In addition to finding that trial counsel reviewed the digital image evidence at the police department before trial, the circuit court found that Otero received all discovery-type items. These findings are not clearly erroneous. *Sanchez*, 201 Wis. 2d at 236. Furthermore, Otero did not establish postconviction that in relation to the digital child pornography images, the result of his trial would have been different had counsel filed a written discovery demand. Otero also did not establish postconviction how trial counsel's failure to file a written discovery demand impacted counsel's ability to cross-examine Detective Grall regarding the digital image evidence. *See State v. Flynn*, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994). This ineffective assistance claim fails.

¶16 Second, Otero alleges a causal connection between trial counsel's failure to file a written discovery demand and counsel's approach to Dr. Carron's

testimony. Otero argues that Dr. Carron's trial testimony exceeded the scope of her CHIPS testimony. At the postconviction motion hearing, trial counsel testified that he had Dr. Carron's report, and he believed he was prepared to cross-examine her at trial. After the postconviction motion hearing, the circuit court found that the State discharged its duty to update trial counsel on matters relating to Dr. Carron's opinions. This finding is not clearly erroneous. *Sanchez*, 201 Wis. 2d at 236. Because trial counsel received relevant discovery regarding Dr. Carron's opinions, Otero cannot establish that he was prejudiced by counsel's failure to file a written discovery demand. This ineffective assistance claim fails.

¶17 Otero had access to all discovery. He did not otherwise establish that he was prejudiced by counsel's failure to make a written WIS. STAT. § 971.23 discovery demand.

¶18 We turn to Otero's other ineffective assistance claims. Otero argues that his trial counsel was ineffective because he did not obtain and use in his defense a January 31, 2007 medical report that the child had a rash in her genital-anal area approximately three weeks after the sexual assault (the "rash report"). Otero argues that the rash report would have buttressed Dr. Friedlander's testimony that the emergency department physician and nurse likely saw a rash, not an injury resulting from trauma due to sexual assault. The circuit court essentially found that even if the rash report had been presented to the jury, Dr. Friedlander's rash opinion was insufficient to counter the attending nurse's testimony that the child had anal bruising. Therefore, Otero was not prejudiced by counsel's failure to use the rash report to buttress Dr. Friedlander's testimony.

¶19 We agree with the circuit court's analysis. In addition, we observe that the jury was not deprived of rash evidence because the child testified at trial that she

had a rash in the weeks after the sexual assault. The jury could have found that Dr. Friedlander's opinion carried less weight because there were no pictures in the emergency department treatment notes upon which Dr. Friedlander could base his opinion that the child likely had a rash, and the attending nurse testified that the child had bruising, not a rash. The presence of a rash three weeks later, as detailed in the rash report, would not have cast light upon the question of whether there was physical evidence of a sexual assault. Because the rash report would not have changed the outcome at trial, its absence was not prejudicial. Without prejudice, Otero's ineffective assistance claim fails.

¶20 Otero next claims that his trial counsel was ineffective because he presented testimony from Dr. Harasymiw that opened the door to prejudicial evidence. Dr. Harasymiw testified that after psychological testing, he concluded that Otero did not have a diagnosable sexual disorder and could not be diagnosed as a child molester. The circuit court conceded that Dr. Harasymiw's testimony opened the door to prejudicial evidence. Nevertheless, the circuit court found that trial counsel made a strategic decision to offer Dr. Harasymiw's testimony. As the State argues on appeal, the evidence against Otero was significant, and trial counsel made a strategic decision to offer Dr. Harasymiw's testimony that Otero was not a child molester. "A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel." *State v. Elm*, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996). Merely because counsel's strategy was not entirely successful does not mean that counsel's performance was legally insufficient. *State v. Teynor*, 141 Wis. 2d 187, 212, 414 N.W.2d 76 (Ct. App. 1987). This ineffective assistance claim fails.

¶21 Otero next argues that his trial counsel was ineffective because he did not present an expert who could impeach the child's credibility due to her

autism. Furthermore, Otero argues, the expert his trial counsel retained, Hollida Wakefield, was a poor choice. The circuit court found that trial counsel used Ms. Wakefield to question the validity of the forensic interview of the child.³ The court found that Otero did not establish postconviction that he could have offered an expert at trial who would have opined that the child's autism somehow reduced her credibility.⁴ We agree. Otero did not meet his burden to establish how such an expert would have altered the outcome of his trial. *Flynn*, 190 Wis. 2d at 48. This ineffective assistance claim fails.

¶22 Finally, Otero argues that his trial counsel ineffectively addressed and investigated the digital images of child pornography found on his computer. The State responds that Otero did not establish postconviction what a computer expert would have offered to the jury regarding these images. Otero did not meet his burden to establish how such an expert would have altered the outcome of his trial. *Flynn*, 190 Wis. 2d at 48. This ineffective assistance claim fails.

¶23 We turn to Otero's claim that newly discovered evidence required a new trial. By clear and convincing evidence, Otero had to prove: "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." *State v. McCallum*, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). If the defendant satisfies these criteria, "the circuit court must determine

³ Otero does not challenge on appeal the circuit court's ruling admitting the videotaped interview into evidence at trial.

⁴ At trial, Otero's counsel asked Wakefield how the child's autism would affect her credibility. In her response, Wakefield discussed suggestibility in autistic children. The State did not object to the question or answer.

whether a reasonable probability exists that a different result would be reached in a trial.” *Id.* When the newly discovered evidence contradicts prior sworn testimony, the newly discovered evidence must be corroborated by other newly discovered evidence. *Id.* at 473-74; *State v. Carnemolla*, 229 Wis. 2d 648, 661 n.4, 600 N.W.2d 236 (Ct. App. 1999).

¶24 At trial, Otero’s wife testified that she had never seen an incest article found in a bedroom drawer. At the postconviction motion hearing, Mrs. Otero testified that she might have printed the article. She further testified that she conducted research on child pornography on the home computer using what she believed to be Otero’s internet account because she was concerned that a former psychiatrist for one of her family members had been accused of possessing child pornography. Otero argued that his wife’s postconviction recantation regarding the article was newly discovered evidence. The circuit court found that Mrs. Otero’s postconviction testimony regarding the article would not affect the outcome of a new trial; Mrs. Otero’s credibility would be greatly reduced because she gave contradictory sworn testimony at two different proceedings. For purposes of our review, we need only point out that Otero did not satisfy the corroboration requirement applicable to Mrs. Otero’s postconviction testimony, which contradicted her prior sworn testimony. *McCallum*, 208 Wis. 2d at 473-74.

¶25 In conclusion, we agree with the circuit court that Otero’s trial counsel had access to all discovery even though he did not file a written discovery demand under WIS. STAT. § 971.23. We conclude that Otero is not entitled to a new trial due to ineffective assistance of trial counsel or newly discovered evidence.

By the Court.—Judgments and order affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5.

